

# Overview of the Freedom of Information



# Background

- FOIA enacted in 1966--5 U.S.C. § 552—and amended several times (EFOIA in 1996)
- Provides statutory right of access to information in federal agencies
- Ensures informed citizenry/prevent secret law
- Records must be disclosed unless exempt, excluded
- Public interest in withholding—e.g., national security, business, privacy, law enforcement exemptions

# Three Forms of Access

- (a)(1): information that must be published in Federal Register: agency organization, functions, procedures, substantive rules, general policy statements
- (a)(2): information that must be available for public inspection and copying;
  - 1) final opinions, administrative staff manuals, specific policy statements;

# Three Forms of Access

- 2) records released under FOIA which are likely to become the subject of subsequent requests; electronic availability for such records created by agency after 11/1/96 (EFOIA)
- (a)(3): agency, upon request, which reasonably describes the records sought and is made in accordance with published rules, shall make its records promptly available, unless information is exempt/excluded:
  - 1. Agency--nearly all executive branch entities
    - Not personal staff of President

# Three Forms of Access

- 2) Not units within the Executive Office of the President whose sole function is to advise/assist the President
  - 3) not courts, Congress, or state governments
2. Request--reasonable description
  3. "Published rules"--conform with agency regulations
  4. Make records "promptly available"

# Three Forms of Access

- 5. Any person: individuals (U.S./foreign), partnerships, corporations, associations, foreign/state/local governments
  - a) no federal agencies or fugitives
  - b) purpose irrelevant (except for expedited processing)
- 6. Records--not information
  - a) disclosure/nondisclosure (not viewing)
  - b) no need to reorganize, create
  - c) format choice--must provide record in any form requested, if record is "readily reproducible" in that form

# Three Forms of Access

- d) “agency record” tests:
  - 1) created or obtained by agency and under agency control at time of request (DOJ v. Tax Analysts, 492 U.S. 136 (1989))
  - 2) personal records—control/possession, function/use, circumstances/conditions of creation/transfer (Bureau of National Affairs, Inc. v. DOJ, 742 F.2d 1484 (D.C. Cir. 1984))

# Administrative Process

## ➤ A. Initial Request

- 1. Duty to search: Must make reasonable efforts to search for records in electronic form (unless significant interference with operation of the agency's automated information system)
- 2) Referral/consultation
- 3) Time limit--20 working days
  - a) one-time extension of ten working days



# Administrative Process

- b) if more time needed, agency must allow requester opportunity to narrow request or arrange for alternative time for processing
- c) multi-track processing
- d) acknowledgment response
- e) stay of proceedings (Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976))
  - 1) standard: exceptional circumstances exist and agency exercising due diligence

# Administrative Process

- 2) no stay for backlog resulting “from a predictable workload of requests” unless “agency demonstrates reasonable progress in reducing backlog”
- BUT
- Requester’s refusal to reasonably modify the scope of request or arrange an alternative time frame for processing after being given opportunity to do so considered a factor in determining whether exceptional circumstances exist

# Administrative Process

- d) expedited treatment
  - (1) Court-recognized reasons
  - (2) Compelling need = imminent threat to the life or physical safety of an individual
  - OR
  - “With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.”

# Administrative Process

- B. Administrative appeal
  - 1. Time limit--20 working days
  - 2. Exhaustion of administrative remedies
  - 3. Right to judicial review

## Fees and Fee Waivers:

### A. Three types of fees:

1. Search (looking for responsive information)
2. Review (processing the information)

# Fees and Fee Waivers

- 3. Duplication (copying releasable information)
- B. Types of Requesters/Fee Categories:
  - 1. Commercial use: search, review, duplication fees--nothing free
  - 2. Educational institution/noncommercial scientific institution--duplication fees only/100 pages free
  - 3. News media/freelancers—duplication fees only/100 pages free

# Fees and Fee Waivers

- 4. “All others”: search and duplication fees/2 hours and 100 pages free
- C. Miscellaneous: threshold amount (applies to commercial requesters also), advance payment, nonpayment, special services, aggregation, unsuccessful searches
- D. Fee waivers: reduce/waive fees if disclosure will significantly increase public understanding about government operations/activities and is not primarily in commercial interest of requester

# Fees and Fee Waivers

- 1. Indigence alone insufficient
- 2. Identifying the public interest
- 3. Based on releasable information
- 4. Dissemination
- 5. Public at large
- 6. “Commercial”--business sense
- 7. Standard of review